NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23897
THIRD DIVISION Docket Number SC-23347

George E. Larney, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Missouri Pacific Railroad Company :

On behalf of Assistant Signalman D. J. Thornton for thirty days' pay during the period October 27 to November 25, 1978, when he was disciplined for allegedly working in an unsafe manner on September 19, 1978." (Carrier file: K 225-785)

OPINION OF BOARD: On date of September 19, 1978, Claimant, Danny Thornton, an Assistant Signalman and Cecil Haley, a Signal Helper, were instructed by Jim Burton, a Signal Technician, to spray paint the signal apparatus in Group 8 of the retarder yard. Signal Helper Haley was directed to maintain the hose and compressor and at the same time to watch for cars being humped, while the Claimant painted. At approximately 11:30 A.M., while the Claimant was painting a switch machine next to the track, a boxcar was kicked into the track and struck Claimant in his backside knocking him to the ground. On September 20, 1978, Claimant saw his physician and thereafter remained out of service until September 27, 1978, when he returned to duty at his own request.

As a result of this accident, Carrier issued Claimant notice of investigation apprising Claimant the purpose of said investigation was, "to develop the facts and place responsibility, if any, in connection with the charge that you ware working in an unsafe and negligent manner resulting in your alleged personal injury at about 11:30 A.M., September 19, 1978, when you allege a boxcar struck you while working in the Bowl, North Little Rock Yard." This investigation, originally scheduled for October 13, 1978 was postponed at the request of the Organization and subsequently held on October 17, 1978. By written notification dated October 26, 1978, Claimant was apprised by Carrier that based on the evidence adduced at the investigation, he had been adjudged guilty of having violated Item 5 of Conditions of Employment; General Notice, paragraphs 1, 2, 3, and 4; General Rules B, L, and N(1) (2); and Basic Rules 1(a), 8, 35, and 162 of the Uniform Code of Safety Rules. Accordingly, Carrier imposed discipline of thirty (30) days actual suspension which commenced 4:00 P.M., October 27, 1978 and ended 4:00 P.M., November 25, 1978.

The written record reflects that upon his return from this disciplinary suspension, Claimant was given his second formal examination on the Rules and Regulations for the Maintenance of Way and Structures of which he failed, as he did on the first test administered October 27, 1978, to achieve a passing grade of 75%. As a result of his failure to pass the test and in accordance with the Controlling Agreement bearing effective date of May 1, 1964, Claimant

forfeited his seniority thereby terminating his employment relationship with Carrier as of November 27, 1978.

The Organization, addition to contesting Carrier's disciplinary action on its merits, raises procedural objections relative to the notice of charges being insufficient due to no specific references regarding any particular rules violations, and to assert Claimant was not afforded a fair and impartial investigation based on the fact the investigatory hearing was conducted by a Carrier Officer rather than a neutral arbitrator and the fact it was barred from tape recording the proceedings. On the merits, the Organization contends Claimant was not negligent as to his safety while in the performance of his duties and that Carrier failed in its burden of proving Claimant was so negligent.

The Carrier, in addressing the procedural arguments advanced by the Organization, asserts it has the responsibility under the Controlling Agreement to conduct investigatory hearings and to administer discipline as opposed to the holding of adversary proceedings presided wer by a neutral arbitrator as so suggested by the Organization. Furthermore, as part of the system of holding investigations of this type which has prevailed for many years, the parties long ago agreed to compiling a written record of the proceedings by the use of a typewriter rather than by cassette recordings. As to the merits of the instant claim, Carrier argues the fact the Claimant was struck in his backside by a boxcar is evidence itself that he was negligent of his own safety, as it shows he was working with his back turned in the direction of the hump where cars were being kicked into the various yard tracks. Carrier assumes, absent an Organization contention Claimant was unfamiliar with the rules, that Claimant was aware of conditions that required him to be alert to possible hazard from the switching operations going on around him while in the performance of his duties. Carrier submits the Organization has failed to furnish any evidence proving the quantum of discipline assessed against Claimant was excessive or that it resulted from any arbitrary or capricious action on its part.

The Board has assiduously scrutinized the written record in its entirety and finds with respect to the procedural objections raised, that they are without foundation. We concur in Carrier's position that nowhere in the Controlling Agreement is there provision for either utilizing the services of a neutral arbitrator to conduct the investigatory hearing or to permit either party to tape record the proceedings. We further find that notwithstanding the lack of any references to particular rules violations in the notice of charges, said notice was sufficient in that it clearly informed Claimant of the matter under investigation and did not, in any way prevent him from making an adequate defense, in his own behalf. Accordingly, we dismiss all of these procedural objections.

With regard to the merits, we find the preponderance of the evidence to support Carrier's charge Claimant was guilty of negligence under the prevailing circumstances. We further find the quantum of discipline to be commensurate with Claimant's negligence and not to be as a result of any arbitrary or capricious action taken by the Carrier. Accordingly, we find we must deny the instant claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of May 1982.